1997

State of Utah v. Michael James Fisk, III : Brief of Appellant

Utah Court of Appeals

Christine F. Soltis; Assistant Attorney General; Attorneys for Plaintiff-Appellee.
Walter F. Bugden, Jr.; Tara Isaacson; Bugden, Collins & Morton; Attorneys for Defendant-Appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	BRIEF OF
Plaintiff-Appellee,	:	DEFENDANT-APPELLANT
	:	MICHAEL JAMES FISK III
-v-	:	
	:	Priority No. 10
MICHAEL JAMES FISK, III,	:	
	:	Case No. 970462-CA
Defendant-Appellant.	:	
	:	

INTERLOCUTORY APPEAL FROM ORDER
OF THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
(HONORABLE STEPHEN L. HENROID)

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff-Appellee, -v- MICHAEL JAMES FISK, III, Defendant-Appellant.	:	BRIEF OF DEFENDANT-APPELLANT MICHAEL JAMES FISK III Priority No. 10 Case No. 970462-CA

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COMPLETE LIST OF ALL PARTIES

Pursuant to Rule 24(a)(1) of the Utah Rules of Appellate Procedure, the undersigned counsel for appellee represents that the original parties to this action were the State of Utah, Michael James Fisk, III and Melissa Fisk. The charges against Melissa Fisk have been dismissed by the District Court. These parties are and have been the only parties to this litigation.

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STATEMENT OF JURISDICTION

This case is an interlocutory appeal from an order of the Third Judicial District Court of Salt Lake County (the Honorable Stephen L. Henroid). Michael James Fisk, III, the defendant-appellant, petitioned this Court for permission to appeal pursuant to Utah Code Ann. § 78-2-2(j). This Court ordered the petition granted. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(d).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in ruling that the State's incompetence in presenting its case against Mr. Fisk at the first preliminary hearing constituted "other good cause" under State v. Brickey, 714 P.2d 644 (Utah 1986) and that the State could have a second chance for bindover at another preliminary hearing.

APPLICABLE STANDARD OF APPELLATE REVIEW

The applicable standard of appellate review with respect to this issue appears to be *de novo* (as purely a question of law). "[A]ppellate review of a trial court's determination of the law is usually characterized by the term `correctness.'" State v. Pena, 869 P.2d 932, 936 (Utah 1994); "correctness" means "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of the law." Id.; see also State v. Deli, 861 P.2d 431, 433 (Utah 1993).

This issue was preserved in the District Court when Mr. Fisk filed a Motion to Dismiss and Memorandum of Law in support pursuant to State v. Brickey, 714 P.2d 644 (Utah 1986) on May 28, 1997. R. at 145-190.

2. Whether the District Court erred in finding that the State acted in good faith when it failed to present sufficient evidence for bindover at the first preliminary hearing.

APPLICABLE STANDARD OF APPELLATE REVIEW

The District Court's findings of fact regarding prosecutorial good faith are reviewed under a "clearly erroneous" standard. State v. Bobo, 803 P.2d 1268, 1271-72 (Utah Ct. App. 1990).

This issue was preserved in the District Court in oral argument on Mr. Fisk's Motion to Dismiss (R. at 393), and Objection of Michael Fisk to State's Proposed Findings of Fact and Conclusions of Law. (R. at 318-24).

STATEMENT OF THE CASE

This Appeal is from an Interlocutory Order entered on July 22, 1997 by the Honorable Stephen L. Henroid. (R. at 358-63; a true and correct copy is attached hereto as Exhibit "A"). The District Court ruled that the State could proceed to a second preliminary hearing after charges had previously been dismissed against the defendant-appellant, Mr. Fisk, pursuant to State v. Brickey, 714 P.2d 644 (Utah 1986).

HISTORY OF SIGNIFICANT PROCEEDINGS IN DISTRICT COURT AND OVERVIEW OF FACTS

This matter originally came before the Third Circuit Court in 1995 after Mr. Fisk was charged by Information with a Single Count of Child Abuse, a Second Degree Felony. Michael Fisk's wife, Melissa Fisk, was also charged with Child Abuse. A preliminary hearing was held for both defendants on July 18, 1995. The State presented testimony from only three

witnesses: Helen Britton, M.D., Earl McKee, a University of Utah Police Officer, and Kim Beglarian, also a University of Utah Police Officer. The prosecution theory was that Mr. Fisk, or his wife, had intentionally and repeatedly inflicted child abuse upon D.S., a child in the care and custody of both defendants, and that the other defendant had knowingly permitted the perpetrator to inflict the injuries upon the child. The State argued that brain injury and numerous bruises of varying ages on D.S. proved child abuse.[1]

In ordering that both Michael and Melissa Fisk be discharged and the case dismissed, Judge Stephen L. Henroid, sitting as a magistrate, found probable cause to believe that the injuries to D.S. were not caused by accidental means. However, Judge Henroid also noted, "what I didn't hear was any evidence connecting either of the Defendants to any of the injuries. So I find the State has not met its burden with respect to probable cause." R. at 7, p. 113 (emphasis added). The State filed a Notice of Appeal, but later dismissed the appeal before briefing. (see Order of Dismissal, attached hereto as Exhibit "D").

Over one and one-half years after the dismissal, the State re-filed the case splitting the brain injury and the bruising evidence into a Five Count Information against the Defendants, Michael Fisk was charged in Count I with Child Abuse on March 19, 1995, a Second Degree Felony; in Count II with Child Abuse, between March 3 and 19, 1995, a Second Degree

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[1] Any person who intentionally or knowingly inflicts serious physical injury upon a child or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon the child is guilty of Child Abuse, a Second Degree Felony. "Serious physical injury" means any physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture, or which involves a serious substantial risk of death to the child. See Utah Code Ann. § 76-5-109(1)(c) and (2).

Felony, in Count IV with Child Abuse between December of 1994 and March 19, 1995, a Class A Misdemeanor. Melissa Fisk was charged in Count III with Child Abuse, between March 3 and 19, 1995, a Second Degree Felony; and in Count V with Child Abuse between December of 1994 and March 19, 1995, a Class A Misdemeanor. R. at 8-12.

Hearings were held on May 5, 1997 and June 30, 1997 in front of the Honorable Stephen L. Henroid to determine if the case warranted a second preliminary hearing under State v. Brickey, 714 P.2d 644 (Utah 1986). R. at 95-96, 313-14.

The State attempted to satisfy the Brickey requirement of "new or previously unavailable evidence" by offering the opinion of Dr. Marion Walker (R. at 164-65; a copy of Dr. Walker's opinion letter dated May 1, 1997, is attached hereto as Exhibit "C") and by pointing out testimony from the Juvenile Court[2] proceeding that D.S. was fed oatmeal by Melissa Fisk and then left alone in the bedroom with Michael Fisk immediately before his apneic condition was discovered.

Mr. Fisk asserted that the evidence being offered by the State was available at the first preliminary hearing so the State should be barred from refiling. R. at 145-90.

The District Court, in its Findings of Fact (R. at 358-63; a copy of which is attached hereto as Exhibit "A"), rejected the State's position that the evidence was previously unavailable or new. The court found that the "prosecutor failed to discover facts which through the exercise of ordinary diligence could have been discovered." R. at 360, ¶ 5. The court did not

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[2] Following the dismissal of the criminal charge, the State filed a Petition in juvenile court alleging that D.S. was injured while in the care and custody of Michael and Melissa Fisk.

find that the testimony of Dr. Marion Walker was newly discovered or previously unavailable evidence.

The State offered no evidence as to why the prosecution chose not to present the evidence it was now emphasizing. Notwithstanding the absence of any evidence on this point, the court found that the prosecutor's failure to present this evidence "was done innocently and in good faith." R. at 360, ¶ 6.

Despite the finding that the evidence currently presented by the State was previously available, the District Court ruled that the State had met its burden under Brickey as to Count I because the State's "good faith failure to present discoverable evidence" constitutes "other good cause."[3] R. at 361, ¶ 3-5. Counts Two and Four were dismissed with prejudice against Michael Fisk. All charges against Melissa Fisk were dismissed.

SUMMARY OF ARGUMENT

1. The District Court erred in ruling that the State could refile charges under State v. Brickey, 714 P.2d 644 (Utah 1986). The District Court concluded that the State failed to produce any additional evidence that was unavailable at the preliminary hearing, but allowed the State to proceed because there was no evidence that the State acted in bad faith. This ruling violates Mr. Fisk's rights under the due process clause of the Utah Constitution as

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[3] The District Court also concluded that the testimony of Dr. Marion Walker "may amount to newly discovered evidence or good cause." (R. at 361; Exhibit "A" at 4, ¶ 3). However, the District Court's legal conclusion regarding Dr. Marion Walker's testimony is completely inconsistent with its findings of fact and even fails to make a legal conclusion by its use of the word "may." The Defendant asserts that this Court should disregard this conclusion of law under the clearly erroneous standard.

construed in Brickey.

2. The District Court's finding that the State acted in good faith is clearly erroneous as no credible evidence was presented on this issue.

ARGUMENT

I. THE STATE'S INCOMPETENCE IS INSUFFICIENT UNDER BRICKEY TO CONSTITUTE OTHER GOOD CAUSE TO REFILE CHARGES THAT HAVE BEEN PREVIOUSLY DISMISSED.

The District Court erred in ruling that the State could present evidence against Mr. Fisk at another preliminary hearing pursuant to State v. Brickey, 714 P.2d 644 (Utah 1986) because the State mishandled the first preliminary hearing. The State's refiling of charges against Mr. Fisk violates his right to due process of law under Article I, Section 7 of the Utah Constitution.

The Utah Supreme Court has limited the cases in which the State can refile charges against a defendant when a magistrate has dismissed the charges for lack of probable cause at the preliminary hearing. In State v. Brickey, 714 P.2d 644 (Utah 1986), the defendant was charged with Forcible Sexual Assault. At a first preliminary hearing, the victim testified that she and Brickey were talking in the kitchen when he told her she was attractive and then moved his hand along her leg to her genital area and also touched her breast. When the victim said "don't," Brickey stopped touching her but tried to kiss her. Id. at 645. No other evidence was presented at the preliminary hearing. At the close of the case, the defendant argued that the State failed to establish that the defendant had acted without the victim's consent. The Magistrate agreed and dismissed the charge because the State had failed to establish a *prima*

facie case of forcible sexual abuse. Id.

The State then refiled the charge and at the second preliminary hearing called the victim and the victim's father. Although the victim's father had been present at the first preliminary hearing, the State had elected not to call him. At the second preliminary hearing the father testified that when confronted, Brickey admitted "making advances" toward the victim and touching her genital area and breasts. Id. On appeal the Utah Supreme Court agreed with the defendant that the father's testimony did not constitute "new or previously unavailable evidence relating to the issue of consent." Id. at 648. The court stated that the State had no new or previously unavailable evidence, and, "[u]nder these circumstances, there was no good cause for refiling the charge against Brickey . . .." Id. (emphasis added).

The factual and procedural history in Brickey is very similar to the instant case. In Mr. Fisk's case, the State could have consulted with Dr. Walker prior to the preliminary hearing - his opinion is based upon the same evidence available to the State at the first preliminary hearing. However, the State made a tactical decision in how to present its case, and it failed to convince the magistrate that "the crime charge had been committed and that the defendant has committed it . . .." Utah R. Crim. P. 7(h)(2). As in Brickey, the State's tactical decision not to consult Dr. Walker is insufficient to justify a second preliminary hearing.

The holding in Brickey was revisited by the Utah Supreme Court in 1994 in State v. Jaeger, 886 P.2d 53 (Utah 1994). In Jaeger, the magistrate dismissed charges against the defendant for lack of probable cause at a preliminary hearing. The State appealed this decision. The issue presented on appeal was whether the Court of Appeals had jurisdiction to

hear the appeal since a magistrate's decision to bind a defendant over for trial is not an appealable order. Id. at 54. The court held that a dismissal by the magistrate is appealable. In addressing the issue of refiling of charges under Brickey, the court said that the "State cannot refile criminal charges dismissed for lack of evidence unless it can introduce new or additional evidence, or demonstrate other good cause that justifies refiling." Id. (citing State v. Brickey, 714 P.2d at 647-48). This suggests an alternative basis for refiling, but the Utah courts have not expanded further on this issue. The Utah Supreme Court, has, however, provided a remedy for the State when it feels that a dismissal for lack of probable cause was made in error - it can appeal. The State did file an appeal, but then made another strategic decision and dismissed the appeal. (See Order of Dismissal, attached hereto as Exhibit "D").

The District Court has concluded, as a matter of law, that the State's "good faith failure to present discoverable evidence" constitutes "other good cause" under State v. Brickey, 714 P.2d 644, 645 (Utah 1986). This result stretches Brickey beyond the limits of due process. The Brickey opinion cites an Oklahoma case, Jones v. State, 481 P.2d 169 (Okla. Crim. App. 1971), and its holding that a prosecutor cannot refile unless they can "show that new or previously unavailable evidence has surfaced or that other good cause justifies refiling." Brickey at 647 (citing Jones v. State, 481 P.2d at 171).

Jones was further clarified by the case of Harper v. District Court of Oklahoma County, 484 P.2d 891 (Okla. Crim. App. 1971). There, the court states that a continuance of a preliminary hearing may be allowed if the "prosecutor miscalculates and fails to present sufficient evidence" and "that the additional witnesses, or other evidence, are reasonably

available; and that a continuance will not be sought in order to conduct further investigation seeking the evidence, in a dilatory manner." Id. at 897. This statement relates solely to the issue of a continuance of the preliminary hearing, not refiling of the charges. On the issue of refiling a charge, the Harper court noted, "for good cause shown, and subject to the present-ment of new evidence, the charge may be refiled." Id. (emphasis added). This case contem-plates a two-part analysis - with refiling being allowed only if both good cause and new evidence are presented by the State.[4]

Other jurisdictions have explicitly limited refiling of a criminal complaint after the dismissal at preliminary hearing to those situations where new evidence is discovered. For example, in Wittke v. State ex rel. Smith, 259 N.W.2d 515, 516 (Wis. 1977), the State's complaint against the defendant had been fully litigated at the preliminary hearing and the court had dismissed the complaint for failure to show probable cause. The State attempted to file an additional complaint and the defendant appealed. The Wisconsin Supreme Court held that absent new evidence, the State was prohibited from refiling the charges, but could appeal the court's decision regarding probable cause. Id. at 520-21. In affirming the lower court's order to discharge the defendant after the filing of the second criminal complaint, the court stated:

> The law does not favor repeated litigation of the same issue. Public policy and effective judicial administration require that controversies once decided on their merits remain in repose and that inconsistent judicial decisions not be made on the same set of facts. Duplicative litigation involves needless expense

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[4] Mr. Fisk has not located any Oklahoma case that has allowed the State to refile solely because they did not act in bad faith.

and disorder, and creates hardship on the individual who is twice vexed for the same cause."

Id. at 519.

The Wisconsin Supreme Court went on to say: "[i]f dismissal of a first complaint does not preclude the filing of a second, then it is difficult to see how dismissal of the second would preclude the filing of a third, and so on, until the repeated prosecutions reached the point of harassment." Id. at 520.

In Colorado, when a complaint is dismissed after a preliminary hearing in county court, the prosecution may request permission from the district court to file the complaint there. The district court is required to balance the right of the State to prosecute against the rights of the accused to be free from "discrimination and oppression." Holmes v. District Court of Summit County, 668 P.2d 11, 14 (Colo. 1983). In Holmes, the district attorney acknowledged that he had made a tactical decision at the first preliminary hearing to call an officer to testify as to what an informant said, instead of calling the informant himself. Id. at 14-15. The Colorado Supreme Court rejected this as a basis for refiling. The court noted that allowing the district attorney to proceed "would constitute approval of the undesirable practice of presenting as little evidence as posible at the preliminary hearing in the county court and then district court consent for a direct filing if no probable cause is found by the county court." Id. at 15. Again, as in Wittke, this court was concerned that repeated preliminary hearings tax the judicial system and unfairly subject the defendant to multiple prosecutions.

In Brickey, the Utah Supreme Court specifically rejected the State's invitation to rely

upon a prosecutor's good faith to protect the due process rights of an accused. The court observed that, "the courts have had occasion to scrutinize the exercise of the broad discretion accorded prosecutors, and that scrutiny revealed that a prosecutor's good faith is a fragile protection for the accused." Id. at 647. In the instant matter, the prosecutor's unexplained failure to present evidence at the preliminary hearing which was discoverable through the exercise of ordinary diligence does not constitute "other good cause."

The State argued and the District Court concluded that "good cause" amounts to nothing more than an apparent absence of bad faith by the prosecutor. Under this interpretation, so long as a judge finds that the State did not act in bad faith, due process will not prevent the State from taking a second, third, or even a fourth try at obtaining a bind-over. Brickey does not absolve a prosecutor from failures of proof at a preliminary hearing. The conclusion of law that an absence of prosecutorial bad faith constitutes "good cause" under Brickey cannot be squared with the guarantee that an accused receive due process of law at the preliminary hearing stage of a criminal proceeding.

II. THE DISTRICT COURT'S FINDING THAT THE STATE ACTED IN GOOD FAITH IS CLEARLY ERRONEOUS AS THE STATE PRESENTED NO EVIDENCE IN THAT REGARD.

In the District Court's Findings of Fact and Conclusions of Law, the court found that "[p]resentation of the evidence by the State at the July 18, 1995, was done in good faith." (R. at 360; Exhibit "A" at 3, ¶5). The court also found that "the failure to discover the evidence and the failure to present more compelling evidence regarding the timing of the injury and the exclusivity of control over the victim by Michael Fisk was done innocently and in good faith."

(R. at 360; Exhibit "A" at 3, ¶6).

A. The Evidence Marshalled

In support of these findings, the District Court relied upon statements made by Mr. Barlow on behalf of the State. Mr. Barlow stated in argument on Mr. Fisk's Motion to Dismiss that "I think basically it was an innocent misunderstanding and misapprehension of both the facts and the law and the medicine." R. at 392. He went on to say "[t]his is merely a miscalculation. It was a misunderstanding, and it was unfortunate." R. at 392.

The State's submissions on this issue simply state that the case was refiled in good faith. R. at 271.

B. The Evidence is Insufficient to Support the Finding that the State Acted in Good Faith

The statements made by Mr. Barlow and the District Court about the prosecutor's state of mind at the preliminary hearing are sheer conjecture. There was no testimony offered by the prosecutor who conducted the preliminary hearing. Other than the statements made by Mr. Barlow, no evidence was presented on the state of mind or the intentions of the original prosecutor in this case.

In the District Court's oral ruling on Mr. Fisk's Motion to Dismiss, the Court stated:

> Clearly, the State at the time of preliminary hearing, didn't have Dr. Walkers' opinion. And for whatever reason — and I think we are talking about competence here, frankly — the State didn't seem to know about the facts limiting the period of the injury from the eating of the oatmeal for a short period of time after that and Mr. Fisk's proximity to the child during that time period. In criminal cases, there are appeals raised on effectiveness of counsel for the Defendant. I think probably what we have here is ineffective counsel for the State. And I think that amounts to newly discovered evidence on the

part of Dr. Walker and/or its cause to a limited extent.

(R. at 315; a true and correct copy attached hereto as Exhibit "B") (emphasis added).[5] Incompetence is not the same as good faith.

The conclusion of the District Court that the State acted in good faith is unsupported by any evidence in the record. It should not simply be presumed that the State acted in good faith. For the State to proceed, it must bear the burden of establishing that it acted in good faith. The District Court erred in making a finding of fact that the prosecutor acted in good faith since no evidence whatsoever was presented on this issue. Thus, even if this Court were to conclude that prosecutorial good faith provides "other good cause" under Brickey, the State has not established that it acted in good faith at the first preliminary hearing.

CONCLUSION

A prosecutor's unexplained failure to present evidence at a preliminary which was discoverable through the exercise of ordinary diligence does not constitute "other good cause" for the refiling of charges under the due process clause of the Utah Constitution. Such an interpretation of Brickey would mean that so long as a judge made a finding that the State's blunder and failure to present sufficient evidence to meet the probable cause standard was not

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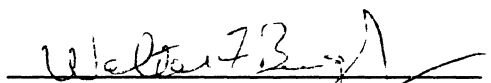
[5] In announcing its ruling, the District Court stated: "while this isn't addressed in Brickey, it probably isn't relevant for me to even consider it. And at this point and stage, it appears that Mr. Fisk has committed a serious crime, and that's something that you have to know weighs on any judge that looking at a situation like this as the Brickey analysis goes forward." R. at 315; Exhibit "B" at p. 2 (emphasis added). Although the District Court disavowed that any assumptions regarding Mr. Fisk's guilt was relevant to the Brickey determination, the fact that this statement was made is unsettling at the least, and perhaps indicative of extraneous considerations influencing the District Court's deliberative process at the worst.

done in bad faith, due process will not preclude the State from repeating the preliminary hearing process until it obtains a bindover. The conclusion that an absence of bad faith constitutes "good cause" under Brickey cannot be reconciled with the guarantee that an accused receive due process of law at the preliminary hearing stage of a criminal proceeding. Mr. Fisk respectfully requests that this Court reverse the District Court's ruling and order that the charge against Mr. Fisk be dismissed with prejudice.

In addition, the District Court's factual finding that the State acted in good faith in the presentation of evidence in the preliminary hearing and in refiling charges in this case is unsupported by any evidence in this case and was clearly erroneous.

RESPECTFULLY SUBMITTED this 17th day of March, 1998.



WALTER F. BUGDEN, JR.
BUGDEN, COLLINS & MORTON, L.C.
Attorneys for Michael James Fisk, III

CERTIFICATE OF SERVICE

I hereby certify that, on the 4th day of March, 1998, I caused to be served two true and correct copies of the foregoing BRIEF OF DEFENDANT-APPELLANT MICHAEL JAMES FISK, III by the method indicated below, and addressed to the following:

Christine Soltis
ASSISTANT ATTORNEY GENERAL
160 East 300 South, Suite 600
P.O. Box 140854
Salt Lake City, Utah 84114

_✓ HAND DELIVERY
✓ U.S. MAIL
_ OVERNIGHT MAIL
_ TELECOPY (FAX)
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ADDENDUM

Tab A

IN THE THIRD DISTRICT COURT, DIVISION II

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff v. MICHAEL JAMES FISK, III MELISSA FISK, Defendants.	: : : : : : :	FINDINGS OF FACT AND CONCLUSIONS OF LAW 971001742FS Case No. 971001742FS Judge Stephen Henroid

A hearing on this case was held June 30, 1997. Michael Fisk was present and represented by Walter F. Bugden, Jr.; Melissa Fisk was present and represented by Edward K. Brass; the State was represented by Craig L. Barlow, Assistant Attorney General. This case was originally filed as a one-count information against both Defendants charging child abuse, a second-degree felony and alleging that on or about between March 1, 1995, and March 19, 1995, the Defendants, having the care and custody of Daniel Shepherd, intentionally or knowingly caused or permitted another to inflict serious physical injury upon said child. The preliminary hearing was held July 18, 1995. At the conclusion of the preliminary hearing, the Court ruled that the injuries to the victim were non-accidental but that there was insufficient evidence to show that the defendants caused the injury and dismissed the information. At the July 18, 1995 preliminary

hearing, the State was represented by the Salt Lake District Attorney's Office. In 1997, the State of Utah, through the Utah Attorney General's Office filed a second information against these Defendants charging various crimes of child abuse during the same time as was alleged in the first information. An initial hearing was held May 5, 1997, to determine if the case warranted further examination by the Court under State v. Brickey, 714 P.2nd 644 (Utah, 1986). The parties have submitted memoranda addressing the filing of new charges. The Court has considered these memoranda and heard arguments from Counsel. Based on the memoranda, the arguments of Counsel, the Court's independent review of the record, and the Court's familiarity with the case, because of the first preliminary hearing, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. There is probable cause to believe that a child, Daniel Shepherd, was injured by non-accidental trauma on or about March 19, 1995.

2. Information about the injuries to the child, the timing of the injuries, and the exclusivity of control of Michael Fisk over the child when the injury likely occurred was available to the State before the preliminary hearing in July, 1995.

3. The evidence presented by the State at the July 18, 1995, preliminary hearing was not sufficient to show probable cause that the injuries were committed by one of the Defendants.

4. Information, by way of proffer, has now been presented to the Court which indicates,

with more precision than was offered at the preliminary hearing, the timing of the injuries to the victim and the exclusivity of control over the victim by Michael Fisk during the period of time when the injuries most likely occurred.

5. Presentation of the evidence by the State at the July 18, 1995, was done in good faith. However, the Court finds that the prosecutor failed to discover facts which through the exercise of ordinary diligence could have been discovered; failed to present critical evidence which could have established when the injury was inflicted and by whom the injury was inflicted.

6. The Court further finds that the facts existed and were discoverable through ordinary diligence upon which this case could have been bound-over after the original preliminary hearing. However, the failure to discover the evidence and the failure to present more compelling evidence regarding the timing of the injury and the exclusivity of control over the victim by Michael Fisk was done innocently and in good faith.

Based on the foregoing Findings of Fact, the Court enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The State failed to present sufficient evidence at the July 18, 1995, preliminary hearing to show probable cause that the injury to the victim was caused by Michael Fisk.

2. The failure to present sufficient evidence of probable cause regarding who

committed the crime was not done in bad faith, maliciously, or with an intent to mislead the Court or defense counsel. Rather, it appears and the court concludes that facts which existed at the time of the first preliminary hearing were discoverable in the exercise of ordinary diligence, but were not presented as evidence at the first preliminary

3. The testimony of Dr. Marion Walker may amount to newly discovered evidence or good cause.

4. The State's good faith failure to present discoverable evidence showing more precise timing of the victim's injuries and the exclusivity of control of the victim by Michael Fisk together with the State's current proffer regarding the timing of the injury and the exclusivity of control by the defendant over the victim constitutes "other good cause" as discussed in State v. Brickey 714 P.2nd 644 (Utah 1986).

5. The Court concludes that Count 1 of the second information charging Michael Fisk with child abuse, a second degree felony, may be presented to a magistrate consistent with State v. Brickey 714 P.2nd 644 (Utah 1986) to determine if that charge should be bound over for trial.

6. The additional charges of the second information, that is, Counts 2, 3, 4, and 5 encompass the same period of time as was charged in the first information. These additional charges could have been separated when the first information was filed and therefore, filing them as separate charges is prohibited by the doctrine of single criminal episode..

7. Counts 2, 3, 4, and 5 are dismissed and the State is barred from refiling them, absent

an appeal by the State and reversal of this decision by the Court of Appeals.

8. The Defendant Michael Fisk, through his counsel, may elect to have evidence in support of count 1 of the second information presented before this Judge or may choose to have another magistrate hear the additional evidence. If the Defendant elects to have another judge or this Judge hear additional evidence regarding count 1, the Defendant must make that election on the record and the Court will make a minute entry stating the election in light of State v. Brickey.

9. This case appears to be a matter of first impression in its application of State v. Brickey. The interests of justice and judicial economy will be served if this matter is reviewed by interlocutory appeal. The Court concludes that no prejudice to either the State or the defendant Michael Fisk will occur if an appeal is taken to the Utah Court of Appeals.

Dated this 22 day of July, 1997.

Judge Stephen Henroid

Approved as to form:

Craig L. Barlow
Assistant Attorney General

Walter F. Bugden, Jr.
Attorney for Michael Fisk

917

Edward K. Brass
Attorney for Melissa Fisk

Tab B

IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

* * *

ORIGINAL

THE STATE OF UTAH,
Plaintiff,
-vs-
MICHAEL & MELISSA FISK,
Defendants.

Case No. 971001743 FS
BENCH DECISION, 6-30-97

BE IT REMEMBERED that on the 30th day of June, 1997, at 9:00 o'clock a.m., this cause came on for hearing before the HONORABLE STEPHEN HENRIOD, District Court, without a jury in the Salt Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the State: CRAIG BARLOW
Attorney at Law

For the Defendant: CRAIG BARLOW
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

PROCEEDINGS

THE COURT: This is a troubling case. And while this isn't addressed in Brickey, it probably isn't relevant for me to even consider it. And at this point and stage, it appears that Mr. Fisk has committed a serious crime, and that's something that you have to know weighs on any judge that's looking at a situation like this as the Brickey analysis goes forward.

There is no question in my mind but that the facts existed and were discoverable upon which this case could have been bound over after the original preliminary hearing. At the same time, I don't see any bad faith on the part of the State whatsoever.

What I come down to is a combination of things: One is, I don't think what the opinion writer in Brickey meant when the word "unavailable" was used is what we would normally think of as "unavailable" would mean. And as a straight matter of definition, "unavailable" would mean that the evidence couldn't have been ferreted out. I think it could have. I think what they mean is what should the State have known, what ought the State have known?

Clearly, the State at the time of preliminary hearing, didn't have Dr. Walkers' opinion. And for whatever reason -- and I think we are talking about competence here, frankly -- the State didn't seem to know about the facts limiting the period of the injury from the eating of the oatmeal for a short period of time after that and Mr. Fisk's proximity to the child during that time period. In criminal cases, there are appeals raised on ineffectiveness of counsel for the Defendant. I think probably what we have here is ineffective counsel for the State. And I think that amounts to newly discovered evidence on the part of Dr. Walker and/or its cause to a limited extent.

I am going to allow this case to go forward on Count I in the Information against Mr. Fisk, only. I think all the rest of it is precluded by the ruling that was made in the original preliminary hearing.

So that's my ruling.

MR. BARLOW: For clarification, Your Honor: Do we then have a bindover or do we --

MR. BUGDEN: Well, there can't be a bindover from that.

THE COURT: You have to have another

preliminary hearing.

MR. BARLOW: Okay, that's just what I was --

THE COURT: And I'm not sure whether that should be in front of me at this stage or not. Clearly, this hearing had to be in front of me. And I don't know. The case was filed in Murray; wasn't it?

MR. BUGDEN: I don't know.

MR. BRASS: It got sent to Murray, excuse me, the way it works --

THE COURT: It was spun out.

MR. BRASS: -- geographical.

THE COURT: What do you think, Mr. Barlow, where should we schedule it?

MR. BARLOW: Well, I'm certainly comfortable having it in front of you, Your Honor. I don't know that there is -- I guess I am concerned that we not have a legal issue about whether you should hear it or some other judge should hear it.

THE COURT: What's the Defense perspective? What is fairer to Mr. Fisk, to have another hearing in front of me when all this has already gone on or to have a fresh face?

MR. BARLOW: I think that is a fair way

to approach it.
MR. BUGDEN: If I can have just a day to think about it?
THE COURT: Certainly.
MR. BUGDEN: The other thing, Your Honor, that I contemplate doing and I'm not sure when is the appropriate time, but I am probably going to appeal your decision.
THE COURT: Certainly.
MR. BUGDEN: I wonder if we couldn't do an interlocutory appeal and perhaps have you sign some findings with regard to probable cause?
THE COURT: I think that findings need to be prepared and I will certify it for an interlocutory appeal upon -- you've already requested it, so I'm telling you now that that's done as soon as the paperwork is ready, because I think the State would have appealed it had the ruling gone the other way. And, actually, since I went both ways, I suppose you can have appeals going both ways.
Let's say a week to submit any submissions you want on how to schedule the preliminary hearing.
MR. BRASS: Okay.
THE COURT: And let's have simultaneous

filings.
MR. BUGDEN: Actually, could we have something filed, the deadline Tuesday? I'm going to be gone all this week.
THE COURT: Tomorrow, Tuesday?
MR. BUGDEN: No, a week from Tuesday.
THE COURT: Oh, sure.
MR. BARLOW: I am going to file it by Thursday because I am leaving the country for two weeks, so...
THE COURT: I will wait two weeks and I'll read whatever we've got then.
MR. BUGDEN And what the State is going to submit are findings of fact and conclusions of law, that's right, and I am going to submit something with regard to the interlocutory appeal and whether or not I want a prelim in front of you or someone else?
THE COURT: Right.
MR. BARLOW: I can also, at least --
THE COURT: You can address that issue --
MR. BARLOW. -- address --
THE COURT. -- please. And I think the concern is fairness to the Defendant on that.
Thank you, Counsel. I think this has

been very well-briefed and very well-argued.
MR. BARLOW: Thank you, Your Honor.
THE COURT: We are in recess.
(Hearing adjourned.)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss
County of SALT LAKE)

I, CARLTON S WAY, CSR, do hereby certify that I am a Certified Shorthand Reporter and a Notary Public in and for the State of Utah,
That I took down the proceedings aforesaid at the time and place therein named and thereafter reduced the same to print by means of computer-aided transcription (CAT) under my direction and control
I further certify that I have no interest in the event of this action
WITNESS MY HAND AND SEAL this the 1st day of July, 1997

(Signature)
CARLTON S WAY, CSR, RPR

Tab C

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THE UNIVERSITY OF UTAH
SCHOOL OF MEDICINE
DEPARTMENT OF NEUROSURGERY
DIVISION OF PEDIATRIC NEUROSURGERY

May 1, 1997

MR. CRAIG BARLOW
ATTORNEY GENERAL'S OFFICE
236 STATE CAPITOL
SALT LAKE CITY, UT 84114

Re: Daniel Alex Shepherd

Dear Mr. Barlow:

As per your request, I have reviewed the medical records regarding Daniel Shepherd. Briefly summarized, Daniel was a two year old male who was brought to the Emergency Room at Primary Children's Medical Center on March 19, 1995 comatose from a severe head injury. As you are aware, there is a pre-existing CT scan from March 3, 1995 which does not show any evidence of brain damage. At the time he was admitted to PCMC on March 19, 1995 he had fresh bleeding over the surface of his brain and retinal hemorrhages seen in his eye grounds. This combination of injuries is highly indicative of a shaking injury.

Information from Daniel's caregivers indicates that in the morning of March 19, 1995 he was noted to be awake, alert and was eating. He was noted to be fussy but there was no other evidence of illness. At approximately 4:00pm on March 19, 1995 his father came from a closed room with Daniel in his arms and Daniel was cyanotic and not breathing. He was brought to PCMC Emergency Room in this condition.

The fact that Daniel was able to be awake, alert and eating on the morning of March 19, 1995 indicates that he had not yet sustained a massive brain injury. That is to say after the injury occurred this child would not have been able to be awake or conscious. The fact that he was noted to be awake and responsive earlier simply means the injury had not yet occurred. Based on the information available to me, Daniel's massive brain injury occurred after he was seen eating and fussing and within hours to minutes of his cyanotic and apnec condition at approximately 4:00pm.

Daniel has no other medical illness and no other injuries which would explain deterioration from a pre-existing condition. Even if he had prior trauma to his head it would not explain the magnitude of injury that was seen at the time of his admission to the hospital. His follow up MRI study November 1995 shows significant loss of brain substance (brain atrophy) secondary to the global injury that he sustained to his brain on March 19, 1995.

11M

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THE UNIVERSITY OF UTAH
SCHOOL OF MEDICINE

DEPARTMENT OF NEUROSURGERY
DIVISION OF PEDIATRIC NEUROSURGERY

May 1, 1997
Re. Daniel Alex Shepherd
Page Two

It is very unlikely and almost impossible for the injuries observed on the March 21, 1995 CT scan and November 1995 MRI study to have been sustained by any other mechanism other than shaking and bashing. The nature of the retinal hemorrhages and the location of the bleeding within and on the surface of his brain is so highly consistent with shaking injury that there is essentially no other explanation.

I hope this information is helpful. Please let me know if I can provide any further information to you.

Sincerely yours,

Marion L. Walker, M.D., F.A.C.S., F.A.A.P.
Professor and Head
Division of Pediatric Neurosurgery
University of Utah
Primary Children's Medical Center

dj

Tab D

IN THE UTAH COURT OF APPEALS

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ORDER OF DISMISSAL

The State of Utah, Appellant, v. Michael J. Fisk and Melissa Fisk, Apellees.	Case No 950497

Before Judges Orme, Bench, and Wilkins (Law and Motion).

This matter is before the Court upon the appellant's motion for voluntary dismissal of the appeal, filed September 18, 1995.

Now therefore, IT IS HEREBY ORDERED that the appeal is dismissed.

Dated this 21st day of September, 1995.

FOR THE LAW AND MOTION PANEL:

Russell W. Bench

Russell W. Bench, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27th day of September, 1995 a true and correct copy of the attached ORDER was deposited in the United States Mail to the parties listed below:

E. Neal Gunnarson
District Attorney for Salt Lake County
Marsha S. Atkin, Esq.
Deputy District Attorney
231 East 400 South
Suite #300
Salt Lake City, UT 84111

Edward K. Brass, Esq.
321 South 600 East
Salt Lake City, UT 84102

Walter F. Bugden, Jr., Esq.
4021 South 700 East, Suite #400
Salt Lake City, UT 84107

and a true and correct copy of the attached ORDER was deposited in the United States Mail to the district court judge listed below:

Third Circuit Court
ATTN: Appeals Clerk
451 South 200 East
Salt Lake City, UT 84111

Dated this 26th day of September, 1995.

By _____
Deputy Clerk

Case No. 950497-CA